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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
MARIAS RIVER - BASIN 41P

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TOWN OF KEVIN, Petitioner, vs. MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION Respondent, CITY OF SHELBY Applicant	**CASE MAPA-0001-WC-2022** Petition for Review Application for Change Nos. 41P 30114262 and 41P 30116656 Application for Beneficial Use Permit No. 41P 30117451

ORDER ON PETITION FOR JUDICIAL REVIEW

The Town of Kevin ("Kevin") petitioned for judicial review of decisions by the Montana Department of Natural Resources and Conservation ("DNRC") to approve applications submitted by the City of Shelby ("Shelby") for a beneficial water use permit and two water right change applications. Shelby and DNRC oppose the petition.

BACKGROUND

A. Shelby's Applications.

Shelby is a municipality in Toole County. Shelby operates a municipal water system that uses thirteen wells located in a shallow well field near the Marias River as its water supply. In addition to supplying the city itself, Shelby also provides water service to surrounding locations, including eight other service areas called Shelby South, Prison, Humic facility, the communities of Devon, Dunkirk, Ethridge, and Big Rose Colony, and the City of Cut Bank. DNRC previously approved change authorizations in 2017 to authorize service to the surrounding areas on a temporary basis until the North Central Montana Regional Water System becomes operational. (4262 AR 1:0025 [Tab 2][1]).

Shelby holds water rights for the existing wells. Some of the water rights are "existing rights" with priority dates older than July 1, 1973. Others are provisional permits issued by DNRC. Shelby's water rights include statement of claim numbers 41P 192878-00, 41P 192880-00, 41P 192881-00, 41P 192882-00, 41P 192877-00, and 41P 58129-00, and provisional permit numbers 41P 4489, 41P 4490, and 41P 58129.

In July 2019, Shelby submitted to DNRC two separate applications to change the points of diversion and places of use for these claims and permits.[2] The applications propose temporarily expanding the currently authorized places of use to include the communities of Oilmont, Nine Mile, and Galata. (4262 AR 1:0023 [Tab 2]). DNRC designated them as application numbers 41P 30114262[3] and 41P 30116656. DNRC issued preliminary determinations to grant the two change applications on December 21, 2020. (4262 AR 1:0021 [Tab 2]; 6656 AR 1:0021 [Tab 2]).

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[1] A separate administrative record exists for each application. Each administrative record contains four volumes. The record is further organized by tabs and each page of each record contains a Bates stamp. This Order uses the following citation protocol: Each citation first includes a prefix that references the last four digits of the application number. For example, references to the record for application 41P-30114262 will begin with the prefix "4262 AR." The citation then is followed by the administrative record volume, page number, and tab number. When the same document is located in all three records, the Order cites to the record for application no. 41P 30114262.

[2] Shelby initially submitted the change applications on April 23, 2018, but later revised and resubmitted them.

[3] Shelby submitted the initial 41P 30114262 change application on April 23, 2018. (4262 AR 0048).

Shelby also applied to DNRC for a new beneficial water use permit. DNRC assigned the permit application no. 41P-30117451. Shelby sought a permit to increase the permitted volume of groundwater produced from its wellfield for public water supply. The application described the proposed place of use as the City of Shelby, and all of the various surrounding communities included in its current and proposed service area. (7451 AR 1:0024 [Tab 2]).

B. Procedural Background.

DNRC determined all the applications correct and complete and issued two preliminary determinations to grant ("PDG") the applications on December 21, 2020. (7451 AR 1:0021 [Tab 1] (permit applications); 4262 AR 1:0021 [Tab 1] (both change applications)). The PDGs approved Shelby's proposed service area place of use that included the surrounding communities.

Kevin objected to the PDGs on several grounds, including DNRC's conclusions as to Shelby's possessory interest in the place of use described in the applications. (4262 AR 2:0569 [Tab 27]; 7451 AR 2:0412 [Tab 21]). After DNRC assigned the case to a hearing examiner, Kevin moved for summary judgment. (4262 AR 2:0781 [Tab 51]). The hearing examiner denied the motion. (4262 AR 2:0742 [Tab 47]). Kevin then filed an emergency motion to certify the denial to the DNRC Director pursuant to ARM 36.12.214(1). (4262 AR 2:0731 [Tab 45]). The hearing examiner initially held the motion in abeyance, then later denied it. (4262 AR 4:1668 [Tab 67]). The hearing examiner conducted a hearing on the permit application on November 10, 2021, and a second hearing on the change application on November 16, 2021. The hearing examiner issued the consolidated Findings of Fact and Conclusions of Law and Final Order ("Final Order") on March 30, 2022. (4262 AR 1:0002 [Tab 1]).[4]

[4] The Final Order is contained in the administrative records for all three applications. *See* 4262 AR 1:0002 [Tab 1]; 6656 AR 1:0002 [Tab 1]; 7451 AR 1:0002 [Tab 1]. Because the hearings examiner issued a single Final Order covering all three applications, for simplicity's sake, all citations to findings and conclusions in the Final Order will be made to the paragraph number in the Final Order.

Kevin filed a Petition for Judicial Review ("Petition") with the Water Court. (Doc. 1.00[5]). After receiving the Petition, the Water Court set, and later modified, a briefing schedule. Kevin limited the issues in its brief to the Final Order's decision that Shelby's permit and change applications satisfy the Water Use Act "possessory interest" criteria. Shelby and DNRC responded, Kevin replied, and the Petition is now fully briefed.

ISSUE

Did DNRC improperly conclude Shelby's applications met the possessory interest criteria of the beneficial water use permit and water right change statutes set out in § 85-2-311(1)(e) and § 85-2-402(2)(d), MCA?

DISCUSSION

A. Permit and Change Process.

The Water Use Act requires DNRC to issue a permit for a new water use when an applicant proves an application meets six statutory criteria: physical availability, legal availability, adverse effect, adequate diversion, beneficial use, and possessory interest. Sections 85-2-112(1), MCA; 85-2-311(1), MCA; *DeBuff v. Mont. Dep't of Nat. Res. & Conservation*, 2021 MT 68, ¶ 26, 403 Mont. 403, 417, 482 P.3d 1183, 1191. DNRC also must approve an application to change certain elements of a water right if an applicant proves an application meets certain other criteria. Section 85-2-402(2), MCA; *Hohenlohe v. State*, 2010 MT 203, 357 Mont. 438, 240 P.3d 628.

If DNRC determines an application meets the criteria, it issues a "preliminary determination to grant" the permit or change. Section 85-2-307(2)(a)(ii), MCA. If someone files a valid objection to a PDG, DNRC appoints a hearing examiner to preside over a contested case hearing on the objection. Sections 2-4-601 to -631; 85-2-309(1), MCA. The hearing provides an opportunity for the applicant and objectors to present evidence and argument why the permit should or should not be granted. Section 2-4-612(1), MCA; *Flathead Lakers Inc. v. Mont. Dep't of Nat. Res. & Conservation*, 2020 MT 132, 400 Mont. 170, 464 P.3d 396.

[5] "Doc." refers to the docket in this case; the citation then refers to the particular document and page by docket number.

The Montana Administrative Procedure Act ("MAPA") allows a party to petition for judicial review of a final agency decision. Section 2-4-604(5), MCA. The hearing examiner's final decision is then reviewable by a district court or the Water Court under MAPA's judicial review provisions. Sections 2-4-701 to -704, MCA.[6]

B. Alleged Prejudice to Kevin's Substantial Rights.

Kevin is a town north of Shelby that also operates a water supply system. Kevin's objection asserts Shelby's proposed expanded water use will encroach on Kevin's water service to existing customers and its water source. (4262 AR 2:0574-75 [Tab 27]). DNRC argues the Court should deny Kevin's petition because Kevin did not provide evidence to prove prejudice to its substantial rights. (Doc. 14.00, at 6). DNRC evidently makes this argument because Kevin opens its briefing by arguing its dependence on bulk water sales might be threatened if Shelby expands its place of use to include some of Kevin's existing customers. (Doc. 9.00, at 2).

Although DNRC does not challenge Kevin's standing, DNRC's argument suggests Kevin must meet a threshold burden to prove Shelby's application will cause prejudice to some substantial right Kevin holds. Under MAPA, the Court may reverse or modify the DNRC's Final Order only if Kevin's "substantial rights" have been prejudiced because the DNRC's decision "exceeds its statutory authority, is affected by legal error, clearly erroneous in light of the whole record, arbitrary or capricious, or characterized by an abuse of discretion." *Vote Solar v. Mont. Dep't of Pub. Serv. Regulation*, 2020 MT 213A, ¶ 36, 401 Mont. 85, 108, 473 P.3d 963, 975 (citing § 2-4-704(2)(a), MCA). If Kevin demonstrates the Final Order violated one of the MAPA standards, then Kevin's substantial rights are violated. MAPA does not require Kevin to separately prove prejudice beyond the MAPA standards.

C. Possessory Interest Criteria.

The permit statute and the change statute both require proof that an "applicant has a possessory interest or the written consent of the person with the possessory interest in

[6] MAPA provides the Water Court with concurrent jurisdiction over petitions for judicial review of final decisions on permit or change applications. Section 2-4-702(2)(e)(i), MCA.

the property where the water is to be put to beneficial use…." Sections 85-2-311(1) and 85-2-402(2)(d), MCA.[7] The PDGs issued by DNRC made findings of fact that Shelby entered into contractual water service agreements with the various communities. The PDGs then state "[i]t is clear that the ultimate user will not accept the supply without consenting to the use of water." (4262 AR 1:0034, ¶ 38 [Tab 2]; 7451 AR 1:0054, ¶ 88 [Tab 2]). Based on these findings, the PDGs concluded Shelby satisfied the possessory interest criteria of both the permit statute and the change statute. (4262 AR 1:0042, ¶ 55 [Tab 2]; 7451 AR 1:0055, ¶ 91 [Tab 2]).

After filing objections, Kevin challenged the PDGs in its motion for summary judgment. (4262 AR 2:0781, [Tab 51]; 7451 AR 2:0580 [Tab 39]). Kevin's motion argued Shelby's applications did not contain adequate documentation of a possessory interest in the parcels of property within the proposed places of use. The DNRC hearing examiner denied the motion, citing ARM 36.12.1802(1)(b) as authority. The summary judgment order says the rule "expressly provides that an applicant for municipal uses of water need not show that the applicant has the possessory interest or the written consent of the person with the possessory interest where the water is to be put to beneficial use." (4262 AR 2:0742, at 3 [Tab 47]; 7451 AR 2:0660, at 3 [Tab 46]).

Kevin next challenged the PDGs findings and conclusions at the hearing. After hearing the testimony and evidence, the Final Order accepted Shelby's concession "that it does not have a possessory interest in all of the places of use identified in the Permit Application and the Change Applications or the written consent of all such owners." (Final Order ¶ 40). But the Final Order goes on to say "[t]here is no evidence in the record to indicate that Applicant will or can force delivery of water on the unwilling." (Final Order, ¶ 41). The Final Order then concludes Shelby's applications satisfy the possessory interest criteria of the permit and change statutes even though Shelby did not prove "it has a possessory interest in all of the places of use identified in the above-

[7] Although both statutes use the same words, the change application statute has commas before and after the phrase "or the written consent of the person with the possessory interest." None of the parties contend that the presence or absence of the commas makes any grammatical difference.

captioned applications." (Final Order, ¶ 44). As authority, the Final Order cites – and paraphrases –ARM 36.12.1802(1)(b), concluding "'it is clear that the ultimate user will not accept the supply [provided by the municipality] without consenting to the use of water on the user's place of use ….'" Final Order, ¶ 42 (brackets in original).

Kevin makes two categories of arguments contending the Final Order incorrectly concluded Shelby's applications satisfy the possessory interest criteria. First, Kevin argues DNRC's Final Order is based on an erroneous interpretation of ARM 36.12.1802(1)(b). Second, Kevin argues that if DNRC accurately interpreted the rule, the rule is invalid because it allows for exemptions from the possessory interest criteria not contemplated by the permit and change statutes.

1. Did DNRC correctly interpret ARM 36.12.1802(1)(b) in determining Shelby's applications demonstrate the requisite possessory interest?

A permit or change applicant may satisfy the possessory interest criteria by either proving it has a "possessory interest" in the property where the water is to be put to beneficial use, or proving the applicant has received "the written consent of the person with the possessory interest" in the property where the water is to be put to beneficial use. Sections 85-2-311(1) and 85-2-402(2)(d), MCA. DNRC adopted rules that describe what a permit or change application must do to satisfy the statutory possessory interest requirements. ARM 36.12.1802(1).[8]

Kevin makes two arguments contending DNRC misinterpreted this rule. First, Kevin argues DNRC gave Shelby a method to demonstrate compliance with the possessory interest requirement that did not involve written consent. Second, and somewhat related, Kevin argues DNRC expanded the scope of the rule to create a special

[8] DNRC's administrative rules implementing the Water Use Act define the term "possessory interest" as

> the right to exert some interest or form of control over specific land. It is the legal right to possess or use property by virtue of an interest created in the property, though it need not be accompanied by fee title, such as the right of a tenant, easement holder, or lessee.

ARM 36.12.101(54).

exception from the possessory interest requirement for municipalities. Both arguments challenge DNRC's interpretation of its own rules.

When evaluating a challenge to how an agency interprets its own rules, the Court gives "great weight" to an agency's interpretation. *Clark Fork Coal. v. Dep't of Envtl. Quality*, 2012 MT 240, ¶ 19, 366 Mont. 427, 433, 288 P.3d 183, 188. The Court must defer to the agency interpretation unless it is "plainly inconsistent with the spirit of the rule." *Id.* The Court also must "sustain an agency's interpretation of a rule so long as it lies within the range of reasonable interpretation permitted by the wording." *Id.*; *see also*, *Hillcrest Nat. Area Found. v. Mont. Dep't of Envtl. Quality*, 2022 MT 240, ¶ 15, 411 Mont. 30, 39, 521 P.3d 766, 772 ("[w]hen evaluating an agency's interpretation of its own rule, courts consider whether the agency's interpretation is within the range of reasonable interpretation" (quotation omitted)).

a. Did DNRC misinterpret the rule to provide Shelby an alternate method to demonstrate compliance with the possessory interest requirement?

DNRC's rules describe what a permit or change application must do to satisfy the statutory possessory interest requirements:

> (1) An applicant or a representative shall sign the application affidavit to affirm the following:
> (a) the statements on the application and all information submitted with the application are true and correct; and
> (b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, *or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use*, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

ARM 36.12.1802(1) (emphasis added).

Kevin contends the Final Order impermissibly rewrote the rule and changed its meaning by inserting a parenthetical in its interpretation of subpart (b) to conclude:

> [A] municipality may demonstrate compliance with the statutory possessory interest requirements if 'it is clear that the ultimate user will not accept the supply *[provided by the municipality]* without consenting to the use of water on the user's place of use.'

(Final Order, ¶ 42, quoting ARM 36.12.1802(1)(b) (emphasis added)).[9]

Kevin argues the way the Final Order paraphrased and applied the rule forced Kevin to prove ultimate users of Shelby's municipal water supply would not consent to the use of water on the ultimate user's place of use. Kevin maintains DNRC's rules failed to give it notice of this requirement prior to the hearing, and "it was thus a mistake for DNRC to fault Kevin for not presenting evidence establishing that Shelby 'will or can force delivery of water on the unwilling.'" (Doc 9.00, at 10-11). As Kevin sees it, DNRC misapplied the regulatory clause "and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use." Kevin argues this restrictive clause does not apply to municipal use, but instead only modifies the non-specific category of "any other context in which water is being supplied to another water supply to others." Kevin evidently assumes if the restrictive clause also applies to municipal uses, there would be no need for the Final Order to retrofit the rule by adding "provided by the municipality" in brackets. Kevin argues that means the Final Order's findings about Kevin's lack of sufficient proof whether Shelby "will or can force delivery of water on the unwilling" is premised on an incorrect reading of the rule.

DNRC and Shelby respond that DNRC applied the rule consistently without how DNRC always has applied the rule in the context of permits and changes for municipal uses. DNRC explains it applies the rule to allow municipal water suppliers to demonstrate possessory interest through water service agreements, which it did for Shelby's

[9] To a certain extent, Kevin's frustration with the Final Order is understandable because the Final Order's parenthetical about acceptance of a supply "provided by the *municipality*" (emphasis added) sews confusion by focusing on the character of the applicant (a "municipality") rather than the character of the use ("municipal use"). In *Lohmeier v. State*, 2008 MT 307, ¶ 29, 346 Mont. 23, 32-33, 192 P.3d 1137, 1144, the Montana Supreme Court held the "character of the *use*" is "the defining factor in determining whether an application could be considered as one within the municipal use category." DNRC itself recognizes this distinction in its response brief. (Doc. 14.00, at 7 "[t]here is no such right as a 'municipality' water right").

applications. (Doc. 14.00, at 9). The PDGs and Final Order confirm DNRC interprets ARM 36.12.1802 as authorizing a municipal user to demonstrate consent through the use of contractual service agreements.

DNRC's interpretation is a permissible application of the rules. The rule is structured to recognize implicit possessory interest consent for several categories of uses where the owner of a water right supplies water to others. These include the four specific uses (sale, rental, distribution, or municipal use), and one general ("any other context"). At least as to Shelby's municipal use, DNRC also required it be "clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use."

The PDGs made this clarity finding by citing the water service agreements Shelby entered into with the outlying communities. The possessory interest determinations in the PDGs focused on whether Shelby had contractual relationships with those entities to which it intended to provide water. The PDGs found they did. (4262 AR 1:0034, ¶ 38 [Tab 2]; 7451 AR 1:0054, ¶ 88 [Tab 2]). Kevin does not argue the service agreements are missing or are deficient in any way. Based on these contractual relationships, the PDGs cited ARM 36.12.1802 and determined "the ultimate user will not accept the supply without consenting to the use of water." (*Id.*). Kevin was given the opportunity at the hearing to challenge the findings as to the water service agreements, and the Final Order concluded Kevin failed to do so.

Kevin's criticism of DNRC's application of the regulatory standard seems to rely on a rigid application of a grammatical rule that the restrictive clause "and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use" does not modify "municipal use" because there is no comma after the clause "or in any other context in which water is being supplied to another." Kevin does not cite any Montana statute or case adopting such a rule of construction, and courts typically do not base interpretive decisions solely on the presence or absence of a comma. *See, e.g., Mills v. State Bd. of Equalization*, 97 Mont. 13, 28, 33 P.2d 563, 569 (1934)

("[C]onstruing a statute according to the punctuation is a most fallible guide by which to interpret a writing.").

The hearing examiner inserted the parenthetical in the quotation of the rule in the Final Order not to change what the rule requires, but to explain how DNRC interprets the rule. DNRC applied the rule in such a way as to make it clear that municipal use does not require consent from every end user because the water service agreements provided sufficient evidence that Shelby only seeks authority to provide water to parties covered by a water service agreement.

Other than apparently relying on a rigid application of an uncited grammatical rule, Kevin offers little to show DNRC's application of the rule falls outside the "range of reasonable interpretation," which is the standard Kevin must meet. *Clark Fork Coal.*, ¶ 19. In other words, Kevin never explains why it is unreasonable for DNRC to rely on evidence of water service agreements to demonstrate written consent of possessory interest from the communities to which Shelby proposes to supply water. Given that a basic characteristic of a municipal water right is to supply water to others, Kevin has failed to prove DNRC unreasonably applied its rule. *See, e.g., City of Helena v. Cmty. of Rimini*, 2017 MT 145, 388 Mont. 1, 397 P.3d 1 (describing elements of Helena's municipal water system, including its diversion, transmission, water treatment, and fire defense infrastructure, in the context of an abandonment proceeding); *Lohmeier*, ¶ 29 (recognizing that "private entities could qualify as municipal users as long as those entities were operating public water supplies").

b. Is ARM 36.12.1802(1) limited to identifying affidavit contents and exceptions?

Kevin argues the purpose of ARM 36.12.1802(1)(b) is "to provide a *municipality* greater flexibility in how it can satisfy the possessory interest requirement by not requiring the municipality to sign the same affidavit other applicants must sign." (Doc. 9.00, at 11) (emphasis added). Kevin misstates the rule because it applies to "municipal *use*," meaning the character of the use, regardless of whether the applicant is a municipality. (emphasis added). Kevin also provides no analysis as to what purpose is

served by interpreting the rule solely to allow municipalities greater flexibility in whether evidence is verified or not verified by an affidavit.

Both DNRC and Shelby provide examples of other municipal use applications where DNRC interpreted the possessory interest criteria consistent with how it applied the rules to Shelby's applications. (Doc. 17.00, at 9-14). For example, in *In re Application for Beneficial Water Use Permit No. 41H 30019215 by Utility Solutions, LLC*, Permit No. 41H 30019215, Final Order (DNRC 2007),[10] the hearing examiner concluded a municipal use applicant proved possessory interest because the applicant "will not supply water to any landowner without the landowner subscribing to the service, which is by its nature, consent." *Utility Solutions*, Findings of Fact, ¶ 23. Kevin criticizes this decision as isolated, and not one where the possessory interest criteria was actually litigated. (Doc. 18.00, at 5). However, Kevin cites no examples of instances where DNRC has applied the municipal use possessory criteria any differently than it did in both *Utility Solutions* and Shelby's applications. Moreover, the cases DNRC and Shelby cite show DNRC has consistently followed this interpretation for many years without challenge, which further undercuts Kevin's position. *See Mont. Trout Unlimited v. Mont. Dep't of Nat. Res. & Conservation*, 2006 MT 72, ¶ 37, 331 Mont. 483, 494, 133 P.3d 224, 231 (longstanding agency interpretations are given "'respectful consideration'").

Kevin suggests DNRC's application of the rule will open the door to municipalities claiming a place of use as large as it "would like, up to covering the entire State of Montana." (Doc. 9.00, at 12). As DNRC indicates in its response, Kevin's argument ignores the requirement that municipal use applicants also satisfy each of the other criteria of the permit or change statutes and rules. (Doc. 14.00, at 7, n. 6). The PDGs illustrate this point. For example, the permit and change criteria require an applicant to submit information to prove the "proposed means of diversion, construction, and operation of the appropriation works are adequate." Sections 85-2-311(1)(c); 85-2-

[10] Available at: http://archive-dnrc.mt.gov/divisions/water/water-rights/docs/hearing-order/cases/30019215-41h_utility_solutions.pdf/view. (Viewed Mar. 13, 2023).

402(2)(b), MCA. The PDGs contain extensive and detailed analysis of the engineering plans Shelby filed to satisfy these criteria. (4262 AR 1:0032-0034 [Tab 2]). The existence of these and other application and approval criteria make it unlikely any municipal use applicant would seek to exploit DNRC's interpretation of the possessory interest standard to stake out an unreasonably large place of use through the permit and change process.

2. Does DNRC's interpretation of ARM 36.12.1802(1)(b) contradict statutory provisions and cause the regulation to be unlawful and thus void?

Kevin's second line of attack contends ARM 36.12.1802(1)(b), as interpreted by DNRC, is void as conflicting with the Water Use Act. Kevin argues DNRC's interpretation allows a municipal use water right "to satisfy the possessory interest requirement based on an assumption that water will not be forced on the end user." (Doc. 9.00, at 13). Kevin asserts DNRC has created an unauthorized exception from the statutory requirement that an applicant prove it "has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use…." Sections 85-2-311(1)(e) and 85-2-402(2)(d), MCA.

The question of whether an administrative regulation "impermissibly conflicts with a statute is a question of law to be decided by the court." *Clark Fork Coal. v. Tubbs*, 2016 MT 229, ¶ 18, 384 Mont. 503, 511, 380 P.3d 771, 777 (citation omitted). This analysis begins with "an examination of the statute itself" to determine whether the rule accurately implements "the objectives the Legislature sought to achieve." *Id.*, ¶ 20. If the rule is either (1) "contradictory or inconsistent with the statute, or (2) adds a requirement not envisioned by the Legislature," the Court must find the rule invalid. *Id.*, ¶ 26.

The property "where the water is to be put to beneficial use" defines the scope of the possessory interest requirement. Sections 85-2-311(1)(e) and 85-2-402(2)(d), MCA. The Water Use Act recognizes "municipal" use as a beneficial use. Section 85-2-102(5)(a), MCA; see *Claimant: Lockwood Area Yellowstone County Water & Sewer Dist.*, 2015 Mont. Water LEXIS 12, *14 ("[m]unicipal use of water has long been recognized as beneficial"). Neither the Act nor its implementing regulations define the

term "municipal use." The statute also does not define specifically where beneficial use occurs when the beneficial use is municipal.

Despite the lack of specific statutory or regulatory definition, numerous court cases and provisions of the Montana Code provide context as to the scope of municipal use as a beneficial use. For example, in *City of Helena*, the Montana Supreme Court evaluated a variety of elements of Helena's municipal water system, including its diversion, transmission, water treatment, and fire defense infrastructure in an abandonment proceeding. In a variety of other contexts, the Court has also evaluated municipal use in the context of an overall system of delivering water, rather than focusing solely on the ultimate consumer as Kevin does here. *See, Lohmeier* (upholding DNRC repeal of municipal use definition); *Town of Manhattan v. Dep't of Nat. Res. & Conservation of Mont*., 2012 MT 81, 364 Mont. 450, 276 P.3d 920; *City of Bozeman v. Mont. Dep't of Nat. Res. & Conservation*, 2020 MT 214, 401 Mont. 135, 471 P.3d 46. These cases indicate, municipal use encompasses the overall system to provide water service to a consumer. *See, e.g.*, ARM 38.5.2503 (rules for provision of water service); § 75-6-102(15), MCA (defining "public water supply system" as "a system for the provision of water for human consumption"). Municipal use is also one of several types of beneficial uses where water is appropriated for sale, rental, or distribution to others. In several cases, the Montana Supreme Court has confirmed these types of uses as valid beneficial uses. *See, Bailey v. Tintinger*, 45 Mont. 154, 177, 122 P. 575, 583 (1912) (recognizing "the right of a public service corporation to make an appropriation independently of its present or future customers"); *In re United States (Barthelmess Ranch)*, 2016 MT 348, ¶ 39, 386 Mont. 121, 134, 386 P.3d 952, 961 (appropriations that make water available for the use of others); *Curry v. Pondera Cnty. Canal & Reservoir Co*.), 2016 MT 77, ¶ 25, 383 Mont. 93, 102, 370 P.3d 440, 447 ("appropriation of water for sale has long been accepted as a beneficial use").

These authorities show that when water is made available for sale, rental, or distribution to others, beneficial use is broader than just actual use of water by third parties that the appropriator does not control. Rather, beneficial use occurs when systems

are built to accomplish sale, rental, or distribution to others. Based on these authorities, water is put to beneficial use for municipal use when an appropriator plans, constructs, and operates a supply system to appropriate and deliver water to the ultimate consumer consistent with contractual arrangements and a variety of regulatory programs that may include safe drinking water and utility or municipal regulation. This means application of the possessory interest criteria may focus on the overall supply system, not each individual end user.

In this case, DNRC documented municipal use as a beneficial use by evaluating the water supply systems and not by canvassing each ultimate end user within those systems. The "beneficial use" section of the PDGs for each application include findings of fact stating that the "need exists to provide a critical and reliable water source to multiple communities until the North Central Montana Regional Water Authority (NCMRWA) is operational." (4262 AR 1:0032, ¶ 22 [Tab 2]; 7451 AR 1:0051, ¶ 78 [Tab 2]). The PDGs concluded the proposed permit and changes were a beneficial use. Kevin did not question these findings and conclusions, and they are not addressed in the Final Order. (4262 AR 1:0006 [Tab 1]). Because the statute puts possessory interest in the context of the beneficial use at issue, DNRC's interpretation of the statute is not inconsistent with what the Legislature intended as set forth in the statute's text. That means even if Kevin is correct that DNRC found the possessory interest standard was met without requiring written consent of every individual consumer within the proposed place of use, DNRC's rule does not create an unauthorized exemption because the statute does limit municipal use solely to actual water use after water is delivered. Kevin therefore has not met its burden to prove DNRC acted beyond what the Legislature directed.

ORDER

Therefore, it is ORDERED, that Kevin's petition is DENIED.

ELECTRONICALLY SIGNED AND DATED BELOW

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Service List Updated 3-30-2023

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